Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Time Warner Cable, Inc. and Bright House Networks, LLC	))	CSR-8960-C MB Docket No. 12-212
	)	
Emergency Petition for Injunction And Sanctions	))	

REPLY OF NEXSTAR BROADCASTING, INC. TO THE OPPOSITION OF TIME WARNER CABLE AND BRIGHT HOUSE NETWORKS TO EMERGENCY PETITION FOR INJUNCTION AND SANCTIONS

Nexstar Broadcasting, Inc. ("Nexstar") hereby submits this reply to Time Warner Cable Inc.'s ("Time Warner") and Bright House Networks, LLC's ("Bright House" and collectively with Time Warner, "TWC") Opposition ("Opposition") to Nexstar's Emergency Petition for Injunction and Sanctions ("Petition"). TWC asks the Commission to disregard TWC's violation of Section 76.1601 and Section 76.1603 of the Commission's rules (the "Notice Rules") and dismiss the Petition as moot.

As TWC notes, this is the second time in as many years that Time Warner has ignored the requirements of the Commission's Notice Rules in the context of a retransmission consent dispute with another broadcaster. This is also the second time that Time Warner is asking the Commission to ignore its actions because it has ceased its underlying violating conduct. However, TWC's cessation of its unlawful conduct neither moots its violation nor excuses its failure to comply with the Notice Rules. Further, as this is Time Warner's second failure to comply, it should be clear to the Commission that Time Warner will continue to flout the

Commission's rules until the Commission affirmatively sanctions Time Warner for its violations and instructs Time Warner to comply with the rules in the future.

Preliminarily, Nexstar notes that TWC repeats throughout its Opposition that it has a broad grant of distribution rights from Nexstar which permits it to carry Nexstar's stations anywhere it so desires. Setting aside whether TWC actually has the rights it purports to have (which Nexstar vigorously contests),[1] a right to import a station's signal into vastly distant markets is wholly irrelevant to TWC's obligations to comply with Commission's Notice Rules regarding the distant substitutions. In addition, the details of TWC's retransmission consent dispute with Hearst regarding the carriage of the Hearst stations are equally irrelevant to TWC's non-compliance with the Notice Rules. The only relevant questions for the Commission to consider are: (1) does Section 76.1601 of the Commission's rules require TWC to provide notice to Nexstar when TWC repositions Nexstar stations by importing them into markets hundreds of miles distant and (2) does Section 76.1603 of the Commission's rules require TWC to provide specific and actual notice (not generic notice by articles in publications available in the market) to its subscribers with respect to TWC's intent to import a vastly distant signal?

I. Section 76.1601 Requires TWC to Give Notice to a Broadcaster When Importing Its Signal Into A Vastly Distant Market.

TWC's claim that "a purported notice violation cannot justify preventing a cable operator from exercising its contractual rights" speaks volumes about TWC's disdain for the Commission's rules.[2] Nexstar did not and does not claim that the Notice Rules prevent TWC from exercising contractual rights (to the extent TWC has such rights), Nexstar merely states that

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1 *See Nexstar Broadcasting, Inc. v. Time Warner Cable Inc.*, No. 3-12 Civ. 2380P, (N.D. Tex).

2 Opposition at p. 6.

the Commission rules require TWC to comply with certain Commission obligations before exercising those rights.

As in the 2010 proceeding, TWC provides no definition of the word "reposition," let alone support for its "plain meaning" of the word. Rather, TWC simply rehashes its 2010 arguments that Section 76.1601 imposes only narrow obligations on cable operators. According to TWC, repositioning means changing only a station's channel location on the same system; it cannot be "repositioning" – that is there is no placing a station in a different position – when, as here, a cable operator adds a station to systems in markets hundreds miles away from the station's home DMA, despite the fact that TWC has never carried the station on that distant system at any previous time.[3]

TWC also again asserts that "a cable operator accords a benefit by expanding [a station's] viewership in out-of-market areas."[4] Yet once again, TWC provides no discussion as to what these "purported benefits" may be. Nexstar did not receive additional retransmission compensation from TWC. Advertisers in Louisville, Kentucky and Orlando, Florida did not flock to place advertising on Nexstar's WROC-TV or WBRE-TV. Advertisers in Rochester and Wilkes-Barre did not pay premium rates because their advertisements were now being seen by additional viewers. In fact, TWC's distant carriage of Nexstar's stations actually harmed relationships with its in-market advertisers. Nexstar received a complaint from an advertiser in Rochester whose Rochester-local franchisees have different (and lower) price points from the Louisville-local franchisees and a Wilkes-Barre, Pennsylvania law firm threatened to withdraw all of its advertising due its very real concern about being subjected to liability in Florida for

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3 *Id.* at pp. 7-8.

4 *Id.*

advertising legal services where they are not admitted to practice law in violation of local ethical standards.[5] Thus, the Commission should simply ignore TWC's unsupported, self-serving claims of broadcaster "benefits."

Finally, even if Section 76.1601 did not require TWC to give advance notice to Nexstar of the addition of its stations to the out-of-market systems, TWC was required to notify Nexstar 30 days in advance of the removal. Nexstar found out TWC terminated the distant market carriage in a press release announcing that it had reached agreement with Hearst. Thus, although Nexstar is pleased with TWC's removal of its stations from the distant systems, the fact remains TWC did so in violation of the requirements of Section 76.1601.

II. The Retransmission Consent Dispute with Hearst Does Not Excuse TWC's Failure to Comply with Section 76.1603 of the Commission's Rules.

Nexstar briefly noted in its Petition that TWC also may have violated Section 76.1603 of the Commission's rules by failing to provide appropriate notice to its subscribers and local franchising authorities with respect to the removal of the applicable Hearst station and the substitution of a Nexstar station in its place.[6] Yet rather than simply providing the Commission with information demonstrating its compliance with this rule,[7] TWC instead complains of Nexstar's alleged lack of standing and, more tellingly, spends nearly 10 pages on policy

[5] Nexstar also received a cease and desist letter from the "Eyewitness News" branded station in the Orlando market claiming that Nexstar's WBRE-TV was infringing on the Orlando station's trademark and syndicated exclusivity rights based on TWC's carriage of WBRE-TV in Orlando. *See* Exhibit A attached hereto. Nexstar does not see any benefit conferred on it through being named a defendant in lawsuit based upon by TWC's out-of-market carriage.

[6] Petition at p. 5, fn. 9.

[7] TWC states that it "routinely provide(s) 30 days' advance notice . . . and did so here," by providing notice to its customers in publications in and around the DMA, as well as sending notice to the relevant local franchising authorities. Opposition at p. 14 and fn. 37. Notably, however, TWC did not provide any evidence in support of its compliance. Moreover, it remains for the Commission to determine whether providing notice in publications is sufficient to meet the obligations imposed on cable operators under Section 76.1603.

arguments to justify its non-compliance; policy arguments that are wholly unnecessary if, as TWC contends, retransmission consent disputes excuse non-compliance with the rule. Although Nexstar takes no position herein on TWC's policy arguments, those arguments are not applicable as to whether TWC complied with its obligations under the rule as currently in effect. As the Commission recently reminded cable operators with respect to violations of the Notice Rules, if a cable operator fails to give notice 30 days before the retransmission consent agreement's expiration and a station is deleted, then the cable operator is in violation of the rules.[8]

TWC also absurdly proclaims that it did not add a new programming service to its systems' lineups for purposes of Section 76.1603. Apparently, TWC believes that because it substituted one NBC network affiliate (or CBS affiliate) for another that it provided viewers with "identical programming."[9] However, network affiliated programming comprises only approximately fifty percent of the programming broadcast on such affiliated stations. Further, numerous viewers noted that the substituted stations did not provide identical programming and that the out-of-market programming did not serve their interests. For example, one viewer stated in correspondence with WBRE-TV:

> Why am I watching news from Pennsylvania this morning in North Carolina? Time Warner has you on instead of WXII, do they own you? We [sic] having severe weather here but I am getting your weather.

Another observed:

> Hi,
> I woke up this morning, to watch WESH news, only to see "foreign" looking graphics. Then, I see the call letters "WBRE" and thought maybe WESH had been sold, but I then saw the weather forecast for eastern PA. Well, I pulled up the news on Google, which had a link to Brighthouse Network's News 13. Seems that

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[8] *See ACC Licensee, Inc.*, Memorandum Opinion and Order, DA 12-1086, ¶ 18 (rel. July 6, 2012). Presumably the Commission holds the same position with respect to substituting one station for another during a retransmission consent dispute.

[9] Opposition at pp. 11-12.

> Hearst Broadcasting, and Brighthouse Networks' agreement had expired back in June, and no renewal had been signed. So, Hearst has pulled WESH, as well as WKCF (CW 18), and MeTV. Now, if you could only bring those cool temps to my area![10]

The Notice Rules are designed to give viewers adequate advance notice of all service changes, not just changes in rates or deletion of programming. Indeed, as the Commission explicitly stated with respect to Section 76.1603, failure to reach a retransmission consent agreement is not an excuse for failing to provide viewer notice.[11] Accordingly, unless and until the Commission modifies Section 76.1603 to explicitly exclude operators from having to comply with the rule in respect of a retransmission consent dispute, TWC is required to provide the advance notice of any addition, deletion or substitution of programming to its viewers.

III. The Commission Should Not Dismiss the Petition as Moot.

TWC contends that the Commission should dismiss or deny the Petition as moot because TWC has now stopped the offending carriage of Nexstar's stations. As the U.S. Supreme Court has held, the voluntary cessation of illegal conduct would moot a case only if the defendant established that "there is no reasonable expectation that the wrong will be repeated."[12] As TWC has clearly and amply demonstrated, it will re-engage in its violations unless and until the Commission makes an affirmative ruling stating that it must comply with the Notice Rules.[13] Therefore, TWC is wholly incorrect, the matter is not moot.

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10 *See* Exhibit D to the Petition for further viewer commentary.

11 *See Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, fn. 109 (2011).

12 *United States v. W.T. Grant Co.* 345 U.S. 629, 633 (1953). *See also*, Friends Of Earth, Inc. v. Laidlaw Envi-Ronmental Services (TOC), Inc., 528 U.S. 167, 193-94 (holding that a claim for civil penalties intended to deter a polluter from exceeding discharge limits in a permit was not necessarily moot, even when the facility at issue had closed, because the defendant retained the permit).

13 *Adarand Constructors, v. Slator*, 528 U.S. 216, 222 (2000) (burden of showing non-recurrence lies with party asserting mootness).

Further, TWC's self-correction does not eliminate the Commission's authority to enforce its rules. In 2000, when ABC filed an emergency petition regarding TWC's violation of Section 76.1601, TWC returned ABC's stations to its systems prior to Commission action and the Commission elected to treat ABC's petition as a declaratory ruling request rather than a petition for injunctive relief.[14] Indeed, as TWC's actions make clear, unless and until the Commission takes action, it will ignore the Notice Rules to the detriment of broadcasters and viewers.

Respectfully submitted,

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August 29, 2012

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14 *See Time Warner Cable*, Memorandum Opinion and Order, 15 FCC Rcd 7882, fn 8 (2000). *See also*, *Seawest Yacht Brokers*, Forfeiture Order, 9 FCC Rcd 6099 (1994) (corrective action taken to comply with the Rules is expected, and does not mitigate prior forfeitures or violations); *KGVL, Inc.*, Memorandum Opinion and Order, 42 FCC 2d 258 (1973) (licensees not excused for past violations by reason of subsequent corrective action).

CERTIFICATE OF SERVICE

I, Elizabeth Ryder, Vice President & General Counsel of Nexstar Broadcasting, Inc., hereby certify on this 29th day of August, 2012, that a copy of the foregoing Reply of Nexstar Broadcasting, Inc. to the Opposition of Time Warner Cable and Bright House Networks to Emergency Petition For Injunction And Sanctions" was sent via first class mail, postage prepaid, unless otherwise noted, to the following:

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Elizabeth Ryder

EXHIBIT A

DowLohnes

Jonathan Dunn
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July 12, 2012

VIA UPS OVERNIGHT and EMAIL (eryder@nexstar.tv)

Ms. Elizabeth Ryder
Vice President & General Counsel
Nexstar Broadcasting Group, Inc.
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Re: Infringement of EYEWITNESS NEWS, EYEWITNESS NEWS DAYBREAK, EYEWITNESS NEWS AT 5 and EYEWITNESS NEWS AT 11 Service Marks

Dear Ms. Ryder:

This law firm represents WFTV, Inc. ("WFTV"), a subsidiary of Cox Enterprises, Inc. It has come to our client's attention that WBRE has reportedly authorized the retransmission of its broadcast signal in the Orlando, Florida market, and therefore is using or authorizing the use of the marks EYEWITNESS NEWS, EYEWITNESS NEWS DAYBREAK, EYEWITNESS NEWS AT 5 and EYEWITNESS NEWS AT 11 in the Orlando market. For the reasons stated below, your station's unauthorized use and licensing of these marks in the Orlando market constitutes trademark infringement, and violates federal and state laws prohibiting unfair competition.

Since at least as early as 1972, WFTV has used the service mark EYEWITNESS NEWS, since at least as early as the early 1970s, WFTV has used the service mark EYEWITNESS NEWS AT 11, since at least as early as 1976, WFTV has used the service mark EYEWITNESS NEWS DAYBREAK, and since at least as early as the late 1970s, WFTV has used the service mark EYEWITNESS NEWS AT 5 (collectively, the "WFTV Marks") in connection with television broadcasting services and providing local news programming in the central Florida market. WFTV has developed extremely valuable goodwill and an outstanding reputation in the WFTV Marks and the viewing public in central Florida has come to associate the WFTV Marks exclusively with WFTV.

WBRE's unauthorized use and license of the WFTV Marks in the Orlando market in connection with television broadcasting services and news programming is likely to cause consumer confusion in that consumers will be led to believe that WBRE's broadcast is associated with or is being offered, marketed or endorsed by WFTV. Confusion is likely because WBRE's marks and services are identical to the WFTV Marks and services. Any such use of the WFTV Marks by WBRE in central Florida injures the image of WFTV and the valuable goodwill associated with the WFTV Marks. For these reasons, any use by your station in the Orlando market of the WFTV Marks or any confusingly similar mark, constitutes trademark infringement and unfair competition in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and state law and common law, which entitles WFTV to monetary, injunctive and other legal remedies.

Moreover, your authorization of the retransmission of "The Dr. Oz Show" and other syndicated programming in the Orlando market where WFTV has exclusive rights to this syndicated programming significantly undermines the benefits of the bargain WFTV had struck in its agreements with syndicators and therefore likely constitutes tortious interference with contract under state law. Of course, WFTV has no objection to the transmission of these syndicated programs in areas outside the Orlando market.

Accordingly, on behalf of WFTV, we must demand that Nexstar Broadcasting Group, Inc. ("Nexstar") immediately cease and desist all use and license of WFTV Marks, and any other mark that is similar to the WFTV Marks, in the Orlando market. Please note, WFTV takes no issue with WBRE's use of these marks in connection with television broadcasting services and news programming aired exclusively in the Wilkes-Barre, Pennsylvania market, but the use of these marks in the Orlando market severely damages the substantial goodwill WFTV has developed in the WFTV Marks.

Because of the urgency of this matter, and in light of the irreparable injury being caused to our client, we must ask that you provide us with written assurances within **forty-eight (48) hours** that Nexstar will comply with these demands. We hope that this matter can be resolved amicably, but if we do not receive a satisfactory response, our client will take whatever steps it deems necessary to protect its rights. This letter is without prejudice to our client's rights, all of which are expressly reserved.

Thank you in advance for your immediate attention to this matter. I look forward to hearing from you.

Sincerely,

Jonathan H. Dunn

Jonathan H. Dunn

cc: Bob Bee, General Manager, WBRE